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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 456

CUMBERLAND FARMS, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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August 21, 1968

Blanchard Press, Inc., Boston, Mass. — Law Printers

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cumberland Farms, Inc., the petitioner herein, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the First Circuit entered in the above-entitled case on June 5, 1968.

Opinions Below

The opinion of the Circuit Court of Appeals for the First Circuit on the National Labor Relations Board's petition

for enforcement of its order is appended hereto and is reported at 370 F. 2d 54 (1st Cir, 1966). The opinion of the Circuit Court of Appeals for the First Circuit on the National Labor Relations Board's petition upon remand for enforcement of its order is unreported and is appended hereto.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on June 5, 1968 and is appended hereto. The jurisdiction of the Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Whether the National Labor Relations Board is acting in the public interest, as it is required to do when administering the provisions of the National Labor Relations Act, when it announces a definite Board policy concerning the unit placement of truck drivers and then fails to apply that policy consistently to substantially identical fact patterns.

2. Whether the National Labor Relations Board's order, as enforced by the United States Court of Appeals, is arbitrary and capricious in view of the Board's failure to articulate with any reasonable degree of clarity the reasons for the inclusion of truck drivers, mechanics, and loaders in the same bargaining unit with production and maintenance employees.

Statutes Involved

Section 9(b) of the National Labor Relations Act, 49 Stat 453, as amended, 29 USC §159(b) (1964 ed.).

> The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

Section 8(a)(1) and (5) of the National Labor Relations Act, 49 Stat 452, as amended 29 USC §§ 158 (a)(1) and (5) (1964 ed.).

> Section 158 (a)(1)
>
> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

> Section 158 (a)(5)
>
> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Statement

This case originated with the petition of the National Labor Relations Board, hereinafter referred to as Board, to enforce its order issued on January 11, 1966, the Board having found that your Petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act as amended in that it refused to bargain with Local 653, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereinafter referred to as the Union). Your Petitioner resisted enforcement on

the ground that the unit established by the Board was not appropriate in that it included within a unit of production and maintenance workers a group of truck drivers, mechanics and loaders, which inclusion was contrary to and inconsistent with previous Board rulings. The matter was heard before the United States Court of Appeals for the First Circuit and that Court denied enforcement of the Board's order and remanded the case to the Board "for articulation of valid reasons, if indeed there are any, for including truck drivers in the more comprehensive unit." See *NLRB* v. *Cumberland Farms, Inc.,* 370 F2d 54, 57 (1966).

The Board accepted the Court's remand, reconsidered its earlier decision in the underlying representation case and its earlier decision in the instant unfair labor practice proceeding and found no compelling reason to modify its previous unit holding. On September 26, 1967, the Board reaffirmed its order of January 11, 1966, and when your Petitioner refused to comply, the Board on December 26, 1967, filed a petition for enforcement of its Supplemental Order to which your Petitioner filed its answer which again raised the issue of the appropriateness of the bargaining unit. On June 5, 1968, the First Circuit enforced the Board order of September 26, 1967, and in an accompanying opinion stated that while "... we are obliged to agree with the respondent that the Board's effort to distinguish the factual situation here from that in *E. H. Koester Bakery Co.,* 136 NLRB 1006 (1962) (where the Board refused to include truck drivers with the in-plant employees) is not very convincing. . . . On balance, however, we are of the opinion that the Board has wide discretion in choosing among appropriate units and that minor factual differences may be sufficient to justify opposite results."

On July 10, 1968, the First Circuit granted a stay of enforcement of its decree pending your Petitioner's ap-

plication for a writ of certiorari in this Honorable Court.

The United States Court of Appeals for the First Circuit had jurisdiction of this case by virtue of section 10(e), 61 Stat 136, as amended, 29 USC §160(e) (1964 ed.).

Reasons

1. Petitioner contends that the NLRB is not acting in the public interest and is, in fact, causing major uncertainty in the labor relations field when it announces a definite Board policy concerning the unit placement of truck drivers and then fails to apply that policy consistently to substantially identical fact patterns.

This Court has stated that proper determination of an appropriate bargaining unit . . . "necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict." *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416 at 422, 423.

The public's interest in maintaining a certain amount of flexibility in Board determination of an appropriate bargaining unit cannot be seriously questioned. Nevertheless, a point is sometimes reached where there must be a balancing of the public's interest in having a Board that is free from undue restrictions in making bargaining unit determinations against the public's interest in shielding citizens from unlimited administrative discretion.

The following cases when compared to the instant case are illustrative of the Board's contradictory decisions on the issue of truck driver unit placement:

I. *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and American Bread Company.* 170 NLRB 19.

In this case the union had lost a representation election, held among transport drivers, rural route salesmen, and other plant employees all of whom constituted one bargaining unit. The trial examiner in a Supplemental Decision on remand concluded that the transport drivers were improperly included in the unit. The Board, agreeing with the trial examiner, stated that "(T)he record shows that the transport drivers are functionally engaged in the transportation of the employer's product, rather than its production; that in performing these duties they are subject to regulations affecting both their hours and working conditions not experienced by the rural route salesmen or other plant employees; that they spend practically all of their working time away from the . . . plant and have little, if any, contact with the plant employees; and that there is no interchange between the transport drivers and the rural route sales or other plant employees. The record further shows that the parties were in disagreement as to the inclusion of the transport drivers. In these circumstances, we find that the interests of the transport drivers are dissimilar to those of the rural route salesmen and the other plant employees and that they should not have been included in the unit."

The Board cited *Koester* as authority for its decision.

Petitioner contends that the public interest is not at all served by making the outcome of truck driver unit placement depend upon whether a union has won or lost a representation election. Congress has also recognized that the extent of union organization should not be controlling in determining the appropriateness of a proposed bargaining

unit and has so stated in § 9(c)(5) of the Act, 61 Stat 144, 29 USC § 159(c)(5). (see also *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438). The essential facts considered by the Board to be of importance in *American Bread Company* and *Cumberland Farms, Inc.* are too similar to warrant any conclusion other than that the Board is applying the Koester doctrine in an arbitrary and capricious manner.

II. *Southland Paint Co., Inc. and Oil, Chemical and Atomic Workers Union, AFL-CIO,* 156 NLRB 22, enforced in part and denied in part *NLRB* v. *Southland Paint Company, Inc.* 394 F.2d 717 (5th Cir. 1968)

The NLRB, affirming the Trial Examiners Findings, stated "that a production and maintenance unit, excluding Respondent's truck drivers. is appropriate in this case."

The Trial Examiner, rejecting the company's view that truck drivers should be included in the unit, held that there was no community of interest between the drivers and the production and maintenance workers, their hours of employment, the nature of their work, and the areas in which they work being different.

All these elements are present in the case before this Honorable Court and yet the NLRB has included the truck drivers in the same unit with production and maintenance employees. Your Petitioner respectfully contends the only real difference between the two cases is that in *Southland* the union sought to exclude truck drivers and in *Cumberland Farms, Inc.*, the union sought to include them, and that their unit placement should not be made to depend upon the desires of a union.

2. Your Petitioner respectfully maintains that the National Labor Relations Board acted arbitrarily and capriciously by including truck drivers, garage mechanics, and loaders in the same bargaining unit with production and maintenance employees. If the Board's unit determination

is arbitrary and capricious it should not be allowed to stand. *S. D. Warren Co.* v. *NLRB*, 353 F.2d 494, 497.

When the Board exercises the discretion given it by Congress, it must "give clear indication that it has exercised the discretion with which Congress has empowered it." See *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 at 443.

In *E. H. Koester Bakery Co.*, 136 NLRB 1006, the Board announced a policy of predicating the unit placement of truck drivers in each case upon the determination of their community of interest with the employees in the more comprehensive unit. The guide lines which the Board set down were quite clear and are as follows:

(1) Whether truck drivers have related or diverse duties, mode of compensation, hours, supervision and other conditions of employment, and

(2) Whether truck drivers are engaged in the same or related production process or operation or spend a substantial portion of their time in such production or adjunct activities.

The Board stated clearly that if the interests shared with other employees is sufficient to warrant their inclusion then they would include truck drivers in the more comprehensive unit, but if on the other hand, truck drivers are found to have such a diversity of interest from those of other employees as to negate any mutuality of interest, then the Board would exclude them.

Your Petitioner contends that the Board's unit placement of truck drivers, loaders, and garage mechanics is violative of this Court's command in *NLRB* v. *Metropolitan Life Insurance Co.* and is arbitrary and capricious because the Board cannot be said to have given "clear indication that is has exercised the discretion with which Congress has enpowered it" when it announces a decision directly contrary to stated Board policy and rationalizes

its determination on the sole basis of minor and insignificant factual distinctions.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6732.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

CUMBERLAND FARMS, INC.,
RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD.

ALDRICH, *Chief Judge,* WOODBURY,* *Senior Judge,*
and MCENTEE, *Circuit Judge.*

Warren M. Davison, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, were on brief, for petitioner.

Owen P. Reid, with whom *Robert J. McGarry* and *Graham, Reid, Ewing & Stapleton* were on brief, for respondent.

OPINION OF THE COURT.

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* Sitting by designation.

December 20, 1966.

WOODBURY, *Senior Circuit Judge.* On this petition for enforcement of an order of the National Labor Relations Board we are faced only with the question of the appropriateness of a collective bargaining unit.

The Respondent, Cumberland Farms, Inc., is engaged in the business of receiving, processing and packaging milk and dairy products at its plant in Canton, Massachusetts, and shipping its products from its plant to retail stores owned and operated by a subsidiary corporation. At the time of the election to be described presently it employed some 100 nonsupervisory-nonclerical employees.

Early in 1964 Local 653, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed a representation petition with the Board's Regional Office in Boston, Massachusetts, asking for the designation of a bargain unit to include all production and maintenance workers at the Canton plant including truck drivers. The Board delegated its powers in the premises to the Regional Director for the First Region, as it is empowered to do by § 3(b) of the Act, 29 U.S.C. § 153(b), and the latter, after a hearing before a hearing officer, affirmed the officer and found that the employee unit appropriate for the purpose of collective bargaining consisted of: "All production and maintenance employees at the Employer's Canton, Massachusetts plant, including truck drivers, mechanics and loaders, but excluding office clerical employees, laboratory technicians, farm laborers, construction workers, professional employees, guards and supervisors as defined in the Act."

The Board granted the Respondent's request for review but only as to a separate issue with respect to inclusion in the unit of similar employees in a separate plant[1] and

[1] That plant was then being and has now been phased out of existence and the employees formerly there now work at the Canton plant. There remains no issue as to their inclusion in the unit.

summarily affirmed the Regional Director's unit determination. The Union won an election conducted under Board auspices by a rather narrow margin and the Board duly certified the Union as the collective bargaining representative of the employees in the unit described above. The Respondent refused to bargain collectively with the Union asserting that the unit it purported to represent was inappropriate for the purpose, and General Counsel for the Board filed complaint charging the Respondent with unfair labor practices in violation of § 8(a) (1) and (5) of the Act. 29 U.S.C. § 158(a)(1), (5). The Respondent's answer raised only the issue of the appropriateness of the collective bargaining unit and counsel for the General Counsel moved for judgment on the pleadings. A hearing was held by a trial examiner on an order to show cause why the motion should not be granted, after which the trial examiner granted the motion and recommended a routine cease and desist order to which the Respondent duly filed exceptions. A three-member panel of the Board summarily adopted the trial examiner's findings, conclusions and recommendations and entered an order under § 10(c) of the Act, 29 U.S.C. § 160(c), directing action by the Respondent in conformity with the trial examiner's recommendations. This is the order the Board asks us to enforce.

The Respondent has consistently contended throughout this proceeding that the bargaining unit should consist of production and maintenance employees but should exclude truck drivers. It recognizes that § 9(b) of the Act, 29 U.S.C. § 159(b), vests the Board with very broad discretion in bargaining unit determination but it contends that in this case the Board's unit determination is inconsistent with stated Board policy and is arbitrary and capricious.

In *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006, de-

cided April 12, 1962, the Board departed from its previous rigid policy of including truck drivers in broader units. It said:

> "We have carefully reexamined the treatment accorded truck drivers in unit placement cases. We are convinced that application of the present automatic rule amounts to a refusal to consider on its merits an issue, the resolution of which the parties have been unable to reach based upon their collective experience and knowledge, and one which is basic to a determination of the unit placement of truckdrivers. We have therefore decided to abandon the blanket policy of including truckdrivers in more comprehensive units and to return to the approach of predicating their unit placement in each case upon a determination of their community of interest. In so doing, we shall continue to accord to the history of collective bargaining and to the agreement or stipulation of the parties the substantial weight which has been given to these factors and which we find justified. Similarly, where their representation in a separate unit is requested we shall determine whether they may appropriately constitute a separate unit. However, in the absence of such a request, we shall no longer hold that inclusion is automatically required.
>
> "In our evaluation we shall consider, among others, the following factors: (1) Whether they have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether they are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities. If the interests shared with other employees is [sic] sufficient to warrant their inclusion, we shall

include the truckdrivers in the more comprehensive unit. If, on the other hand, truckdrivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them."

The Regional Director based his decision to include truck drivers in the broader unit on three cases. *Sylvania Electric Products, Inc.*, 135 NLRB 768, decided January 31, 1962, *Kalamazoo Paper Box Corp.*, 136 NLRB 134, decided March 6, 1962, and *Tops Chemical Co.*, 137 NLRB 736, decided June 21, 1962. Although two of those cases were decided before *Koester Bakery*, the Board therein did not apply its rigid rule and automatically include truck drivers in a more comprehensive unit. Instead it included them in the broader unit only after considering the factors listed as the basis for decision in *Koester*, thereby, perhaps, foreshadowing its decision in that case.

The cases relied upon by the Regional Director, however, differ significantly on their facts from the case at bar in that relatively few over-the-road truck drivers were involved in comparison with the number of maintenance and production workers and the truck drivers spent a substantial proportion of their time on in-plant work instead of driving trucks,[2] whereas in the case at bar we are concerned with 7 to 9 tank truck drivers who make long-haul runs to pick up milk in bulk in other states and 20 delivery drivers who transport processed and packaged dairy products from the Canton plant to retail stores. Thus some 30% of the employees here involved are truck drivers. And they spend almost all of their time driving trucks. Only once in a while do they load their own truck or fill in as loaders and assist in loading other trucks.

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[2] In *Gunzenhauser* the Board was concerned with 110 driver-sales- were involved and they spent 50% of their time working at a variety of occupations in the plant.

On the other hand, the cases heavily relied upon by the Respondent, *Koester Bakery Co., Inc.*, supra, and *Ganzenhauser Bakery, Inc.*, 137 NLRB 1613, decided July 23, 1962, also differ significantly in their facts from the case at bar, for in both cases the Board was concerned with a large group of route salesmen,[3] that is to say men who drove trucks over a route selling bakery products house to house, to restaurants and to a few retail markets. Since, except for the time spent in loading, these men were away from the plant all day and were primarily salesmen and only incidentally truck drivers, the Board excluded them from a more comprehensive unit including production and maintenance workers.

A third case relied upon by the Respondent, *Delight Bakery, Inc.*, 145 NLRB 893, decided January 10, 1964, is very similar to the last two cases considered with the exception that only 4 drivers were involved.

Naturally applications of the *Koester* approach result sometimes in the inclusion of truck drivers in broader units and sometimes not. Each case as it arises must be decided on its own facts, And we recognize that the Board has broad authority in the field of unit determination. But the Board cannot act arbitrarily or capriciously. There must be some rational factual basis for its determinations, Here as factual basis all we have is the statement of the District Director, whose decision the Board summarily affirmed, who said:

> ". . : All employees share in similar vacation, holiday, Blue Cross and group insurance benefits. Payrolls for all employees are made up at the same location and all employees use the same lunchroom. Based

[3] In *Ganzenhauser* the Board wac concerned with 110 driver-salesmen and 2 over-the-road truck drivers and in *Koester* with 175 driver-salesmen and 3 over-the-road truck drivers.

upon the substantial community of interest which exists between the truck drivers, mechanics and loaders and the in-plant production employees, and since no other labor organization is seeking to represent the drivers and allied categories separately, it is found that the broad production and maintenance unit, including truck drivers, mechancics and loaders, is appropriate."

The fact that all employees share in similar vacation, holiday and insurance benefits and the fact that all pay. rolls, are made up at the same location is at the most *de minimis*. The fact that all employees use the same lunch room seems wholly irrelevant since apparently the truck drivers are on the road all day. The statement that a substantial community of interest exists between the truck drivers and other employees is nothing but the statement of a conclusion. Unlike the truck drivers in the cases relied upon by the District Director and the Board, the truck drivers here only "sometimes" work in the plant and then only as loaders of their own or another driver's truck. The record shows little community of interest between the truck drivers and the other employees of the Respondent's Canton plant. However, in view of the broad powers of the Board in unit determination and to give it the benefit of any possible doubt we shall remand the case to the Board on the authority of *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, (1965), for articulation of valid reasons, if indeed there are any, for including truck drivers in the more comprehensive unit.

A decree will be entered remanding the case to the Board for further proceedings consistent with this opinion.

Appendix B

United States Court of Appeals
For the First Circuit

No. 6732 Supp.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

CUMBERLAND FARMS, INC.,

RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Warren M. Davison, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Leonard M. Wagman*, Attorney, were on brief, for petitioner.

Owen P. Reid, with whom *Robert J. McGarry* and *Graham, Reid, Ewing & Stapleton* were on brief, for respondent.

June 5, 1968.

PER CURIAM. This matter comes to us for enforcement of a Labor Board order following a supplemental decision after our remand, *NLRB* v. *Cumberland Farms, Inc.*, 1 Cir., 1966, 370 F.2d 54. We have considered the Board's supplemental decision and order and cannot say that its position is unjustified. As we noted at the oral argument of this case, the criteria relied upon by the employer to separate the in-plant production employees from the various out-of-plant employees would, in turn, tend to require the latter

to be themselves subdivided into more than one unit. Under the circumstances recited by the Board we are not prepared to overrule its selection of a single unit for the entire group. At the same time we are obliged to agree with the respondent that the Board's effort to distinguish the factual situation here from that in *E. H. Koester Bakery Co.*, 136 N.L.R.B. 1006 (1962) (where the Board refused to include truck drivers with the in-plant employees) is not very convincing. On balance, however, we are of the opinion that the Board has wide discretion in choosing among appropriate units and that minor factual differences may be sufficient to justify opposite results.

The order will be enforced.

DECREE

June 5, 1968

This cause came on to be heard on petition upon remand for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The supplemental order of the National Labor Relations Board of September 26, 1967, is hereby affirmed and enforced.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

ENTER,
(s) ALDRICH, Ch. J.